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REMARKS:

Damn good work up on this legislation. Always many disagree with parts of you, MTR and I would like to prepare

FROM:

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FORM NO 241 1 FEB 55 REPLACES FORM 36-8 WHICH MAY BE USED. (47)

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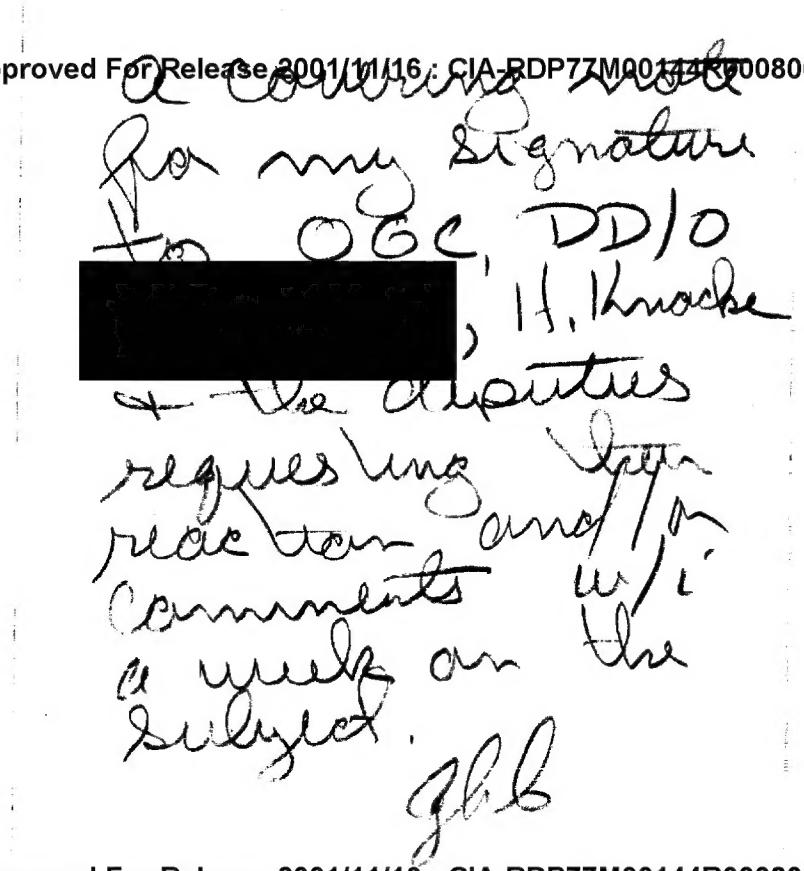

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OLC 75-0488
12 March 1975

MEMORANDUM FOR THE RECORD

SUBJECT: Surveillance Legislation

I. Over twenty bills have been introduced in Congress to date concerning surveillance. These can be resolved into two main classes. One class of legislation aims at barring the Armed Forces from a domestic surveillance role. The other, at restricting or prohibiting electronic surveillance conducted on national security grounds.

II. Armed Forces Surveillance

1. Senators Mathias, Bayh, and Tunney have introduced a bill in the Senate, and eight similar bills have been introduced in the House, to bar domestic surveillance by military personnel. The proposed legislation would prohibit any Government civilian employee or member of the Armed Forces from causing any part of the Armed Forces to conduct investigations into, maintain surveillance over, or maintain records regarding the beliefs, associations, political activity, or private and business affairs of American citizens. There are several exceptions to these proscriptions, none of which are relevant to Agency interests.

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2. Effect on Agency interests: Over-breadth of language may inhibit our domestic collection of foreign intelligence by inhibiting the [redacted] We should work through appropriate congressional channels to insure that the proscriptions adopted will not preclude [redacted] from interviewing American citizens who volunteer information about foreign areas or developments.

III. National Security Surveillance

1. The 1968 Omnibus Crime Control and Safe Streets Act (18 U.S.C. 2511, et seq.) established certain procedures which require

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the Government to obtain a court order issued on probable cause prior to conducting wire or oral communication interception in the investigation of certain offenses. In section 2511(3) of that Act, Congress specifically disavows any limitation on the constitutional powers of the President in national security matters and recognizes that the President has inherent constitutional authority to engage in certain foreign intelligence activities:

> [n]othing contained in this chapter or in section 605 of the Communications Act of 1934 shall limit the constitutional power of the President ... to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. (emphasis added)

The emphasized language implicitly recognizes that foreign intelligence surveillances may be distinguished from national security surveillances aimed at the discovery and prosecution of criminal conspiracies and activity. 25X1C

[redacted]

3. Sentiment that the provisions of 18 U.S.C. 2511(3) (quoted above) are incompatible with Fourth Amendment rights has spawned a Senate bill and over a dozen House bills (some of these identical) aimed at closing what the sponsors view as "the national security loophole" in current surveillance laws. A distinctive approach to national security surveillance is taking shape which would prohibit the use of warrantless surveillance for any reason whatsoever, treating national security surveillance under a single rubric, without distinguishing among the purposes to be served, i.e., foreign intelligence gathering, early warning detection, or national security surveillances aimed at the discovery and prosecution of criminal conspiracies and activity.

(a) S. 743 by Senators Nelson and Kennedy would make the following changes in the law. First, repeal 18 U.S.C. 2511(3) thereby withdrawing whatever congressional recognition that section gave the foreign intelligence surveillance powers of the President. Second, prohibit intercepting the communications of an American citizen or alien admitted for permanent residence until a prior judicial warrant is obtained issued on probable cause that a specific crime, e.g., espionage, has been or is about to be committed. Third, prohibit intercepting the communication of foreign power or its agent until a prior judicial warrant is obtained by establishing probable cause (a) that such interception is necessary to protect the national defense [note narrower standard than national security]; (b) that the interception will be consistent with the international obligations of the United States; and (c) that the target is a foreign power or foreign agent. (A foreign agent is defined as any person, not an American citizen or alien lawfully admitted for permanent residence, whose activities are intended to serve the interests of a foreign power and to undermine the national defense. Each application for such an interception would be made to the D.C. Federal District Court on personal and written authorization of the President and would provide detailed information on the target, the purposes and justification of the interception.) Upon court approval, only the FBI would be authorized to intercept the communication. Fourth, require that every American citizen targetted be informed of the specifics of the surveillance within a month of the last authorized interception. (This disclosure could be postponed if the Government satisfies the court that the target is engaged in a continuing criminal enterprise or that disclosure would endanger national security interests.) A foreign power or its agent need not be informed of interceptions. Fifth, require the Attorney General to report to the Congress, at least quarterly, the details of each interception undertaken on national security grounds, to be filed with the Senate Foreign Relations and Judiciary Committees and the House Foreign Affairs and Judiciary Committees.

(b) H.R. 141 by Representative Kastenmeier, Chairman of the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, which has legislative jurisdiction for surveillance, is similar to the above bill. It would repeal

18 U.S.C. 2511(3) and amend Title 18 to permit communications interception in national security cases only under court order issued on probable cause that an individual has committed one of several enumerated offenses or is engaged in activities intended to serve the interests of a foreign principal and to undermine the national security. The bill does not mention the communications of a foreign power. Each application for an interception would have to be authorized by the Attorney General and made to a Federal judge of competent jurisdiction. The targetted individual would be informed of the surveillance within ninety days. The President, Attorney General, and all Government agencies would be required to supply Congress, through the Senate Judiciary and Foreign Relations Committees and the House Judiciary and Foreign Affairs Committees, any information regarding any interception applied for.

(c) H.R. 214 by Mr. Mosher and seven identical bills co-sponsored by over 70 Congressmen from both parties would prohibit any interception of communications, surreptitious entry, mail-opening, or the procuring and inspection of records of telephone, bank, credit, medical, or other business or private transactions of any individual without court order issued on probable cause that a crime has been committed. Like S. 743 and H.R. 141, reviewed above, these bills would repeal 18 U.S.C. 2511(3). Unlike the above bills, they do not provide for non-law enforcement surveillance. They would also strike out provisions for summary procedures for intercepting communications during emergencies and would require that detailed information on each application for a communication interception be reported to the House and Senate Judiciary Committees.

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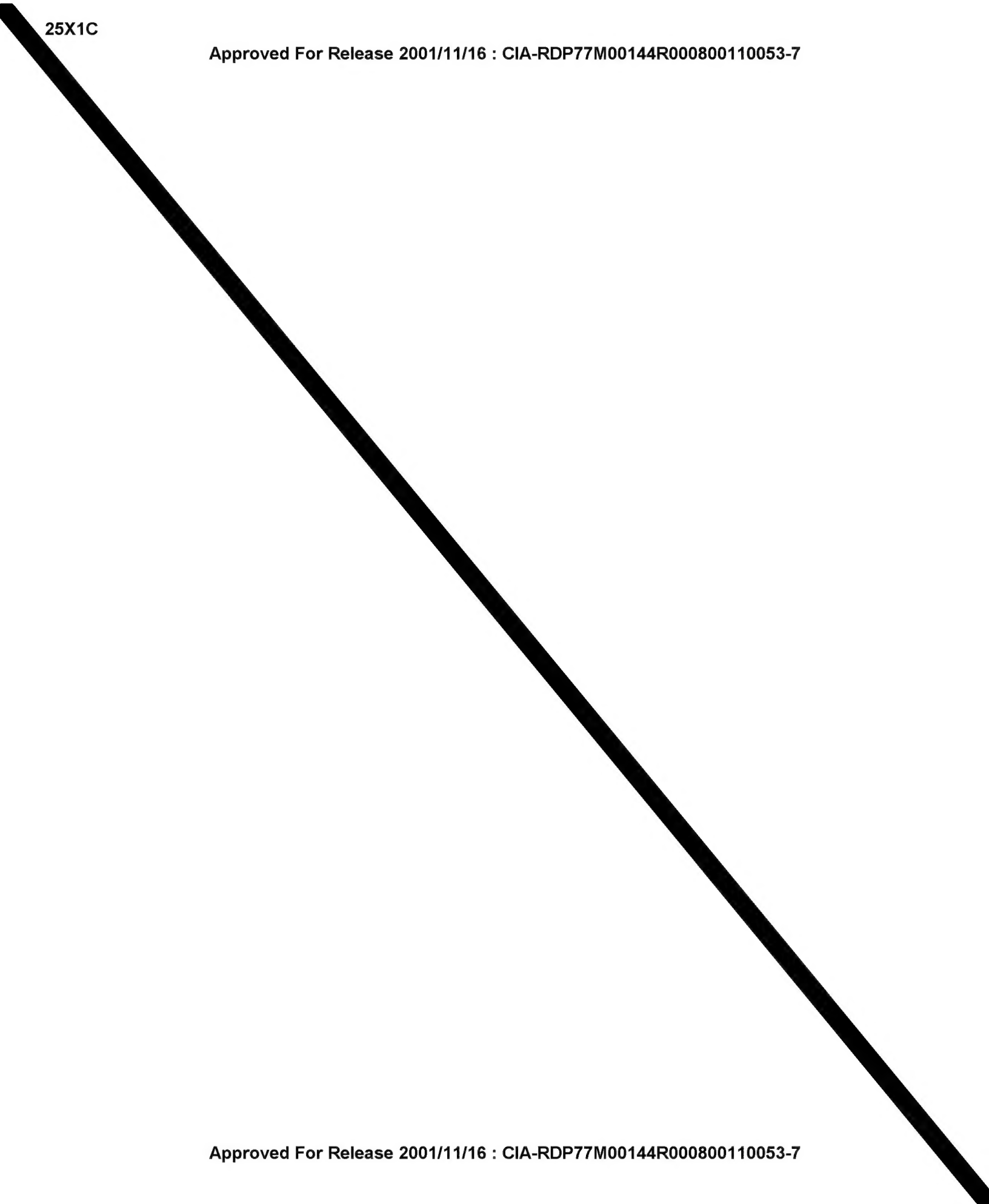

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These bills raise the opportunity to argue that this Agency's authority to conduct foreign electronic surveillance rests only on three bases--assertion of inherent Presidential intelligence-gathering powers, congressional recognition and judicial acceptance. Repeal of 18 U.S.C. 2511(3) may be viewed as weakening the Agency's argument that Congress has recognized foreign intelligence gathering authority inherent in the President and delegated to CIA.

6. Courses of Action: It is likely that some restriction on "national security" electronic surveillance will be enacted this Congress. The Agency must make clear in the public forum that it understands the concern of those who fear that "national security" could be used as a catchall to justify improper governmental invasions of privacy. At the same time, however, it must resist those who would deny the Executive branch any discretion or flexibility in foreign intelligence gathering by imposing judicial regulation over the whole gamut of national security interceptions. Specifically, the Agency must, first, establish a clear distinction between its unique mission of gathering foreign intelligence and the law enforcement and counterintelligence mission of other government departments. Second, the Agency must convincingly demonstrate that COMINT and SIGINT are essential sources of foreign intelligence which do not lend themselves to regulation by judicial standards and procedures, especially ones developed to protect the rights of defendants in criminal proceedings. The importance of distinguishing this Agency's interests from those of law enforcement agencies militates against playing a secondary role in the development of the Executive branch's position on electronic surveillance. Therefore, the following initiatives are recommended:

(1) CIA should inform the House and Senate Judiciary Committees of its interest in pending electronic surveillance legislation.

(2) In formulating its position, CIA should coordinate fully with other concerned agencies so that a consistent Executive branch approach can be developed.

(3) Through LIG the White House should be apprised of the serious ramifications prospective surveillance legislation would have with respect to fundamental Presidential powers.

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Office of Legislative Counsel

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